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OCTOBER TERM, 1956

No. 52

UNITED STATES OF AMERICA, APPELLANT

v.

LUDENIA HOWARD, TRADING AS STOKES FISH CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed at the Court's request in response to questions raised at the oral argument. In answering these questions we make reference to certain of the materials contained in our main brief so that the questions discussed in this memorandum may be treated in full context.

1. The Court has requested information with respect to the manner of publication, distribution, and status of the rules of the Florida commission.

A Florida statute, 14 Florida Statutes Annotated, Section 372.021, Br. p. 44,[1] prescribes the manner in which the commission shall promulgate its regulations.

[1] References designated "Br." are to the Brief for the United States.

Although by virtue of subsection 5 of this statute, subsections (1), (3) and (4) are directory and not mandatory, subsection 2 is mandatory, and this subsection provides that regulations of state-wide application shall become effective thirty days after the filing of a certified copy in the office of the secretary of state. The rule in question, Rule 14.01, Br. p. 48, is of state-wide application and appellee cannot contend that she has been hurt because other rules may become effective at an earlier date. Indeed, appellee does not claim that the directions contained in the other subsections of the statute are not actually followed by the Florida commission and a letter from the commission, App. *infra*, p. 11, indicates that even more is done than is required or directed by the statute to inform the public of the contents of the rules.

Subsection (1) of Section 372.021 provides that, in addition to the filing of a certified copy of the regulations with the secretary of state, a certified copy shall be filed in the office of each county judge of the state. The Florida commission has advised, Br. p. 37, that any person making a request will be supplied with a copy of the Code Book together with all existing amendments thereto which have been approved since the last printing of the book. With exceptions not here material, a license must be obtained before one may fish in Florida and these licenses may be issued by the county judges. Rule 3.06, Wildlife Code of the State of Florida. Thus, copies of the regulations are filed in the very office from which fishing licenses may be obtained.

Subsection (1) of Section 372.021 also provides for publication of a notice in a newspaper having general circulation in each of the congressional districts of the state advising that such rules have been promulgated and are on file in the office of the secretary of state and of each county judge and that a copy thereof may be obtained from the commission itself.

The Government has been further advised by the Florida commission that it has been the practice to amend the rules of the commission as often as revisions are warranted, normally on the average of once or twice a year. Several thousand copies of the code book containing these rules are printed. These copies are circulated without cost, not only to the county judges as required by the statute, but to principal sporting goods and license dealers and anyone else requesting a copy as well.[2] See App. *infra*, p. 11. And before regulations of general state-wide application are promulgated, it is the practice of the commission to hold public meetings to discuss the proposed changes. See App. *infra*, p. 11.

Thus, there is a greater likelihood that the average interested citizen would learn of a change in a rule of the commission than there is that he would learn

[2] Nine copies of the Wildlife Code in use at the time of the alleged offense are filed with the Court herewith. Only two copies of the code, as amended April 1956, had been filed with the Court prior to oral argument, not because copies are difficult to obtain, but because the Government assumed that, in determining the intent of Congress as manifested in a statute which was not limited in its application to Florida, the exact provisions of sections of the Florida Wildlife Code not related to this offense have, at best, only tangential relevance. Br., pp. 10, 33–34.

of a change in a Florida statute or of a decision of the Florida Supreme Court, which appellee concedes would also constitute the "law" of the state. (Appellee's Reply Brief, pp. 9–10).[3]

With respect to the status in Florida of the regulations of the commission, it is conceded that in that state they are given the force and effect of valid and binding law. (Appellee's Reply Brief, p. 12; see Government Br., pp. 17–20.) Appellee urges only that the regulations are not "the law of Florida as contemplated by the Black Bass Act" and does not contend that the rules of the commission violate any provision of the constitution of Florida or of the United States. The Florida legislature has itself referred to the regulations of the fish and game commission as being "laws." Thus, 14 Florida Statutes Annotated, Section 372.07 provides:

> *Section 372.07. Police powers of commission and its agents.*—The commission of game and fresh water fish and each and every of its duly authorized conservation agents, have power and authority, throughout the state, to enforce all

[3] In fact, it has been the law of Florida consistently since 1927 that out-of-state transportation of black bass is illegal. See Br., p. 34. And we are advised by the commission, except for the period between February 1952 and June 1953 when a controlled seining program was in effect and bream, crappie, and like fish could be so transported when properly tagged, out-of-state transportation of bream and crappie has been illegal in Florida consistently since 1943. Thus the rules of the Commission with respect to the subject matter covered by this information have not been as variable or difficult of ascertainment, as appellee suggests. As a commercial fish dealer, appellee must have been familiar with the rules of the Commission. See Br., p. 37.

laws relating to game, non-game birds, fresh water fish and fur-bearing animals, and in connection with said *laws,* in the enforcement thereof, and in the performance of their duties thereunder, to go upon all premises, posted or otherwise; execute warrants and search warrants for the violation of said *laws;* serve subpoenas issued for the examination, investigation and trial of all offenses against said *laws;* carry firearms or other weapons, concealed or otherwise, in the performance of their duties; arrest upon probable cause without warrant any person found in the act of violating any of the provisions of said *laws* or, in pursuit immediately following such violations, examine any person, boat, conveyance, vehicle, game-bag, game-coat or any other receptacle for game, non-game birds, fresh water fish or fur-bearing animals, or any camp, tent, cabin or roster in the presence of any person stopping at or belonging to such camp, tent, cabin or roster, when he has reason to believe, has exhibited his authority and stated to the suspected person in charge his reason for believing that any of the aforesaid *laws* have been violated at such camp; secure and execute search warrants and in pursuance thereof, to enter any building, enclosure or car and to break open, when found necessary, any apartment, chest, locker, box, trunk, crate, basket, bag, package or container and examine the contents thereof; seize and take possession of all game, non-game birds, fresh water fish and fur-bearing animals, which may have been taken or had in possession or under control or which have been shipped or about to be shipped at any time or in any manner contrary to said *laws.* [Emphasis added.]

And 14 Florida Statutes Annotated, Section 372.70 provides:

> *Prosecutions.*—The prosecuting officers of the several courts of criminal jurisdiction of this state shall investigate and prosecute all violations of the *laws* relating to game, fresh-water fish, non-game birds and fur-bearing animals which may be brought to their attention by the game and fresh water fish commission or its conservation officers, or which may otherwise come to their knowledge. [Emphasis added.]

Under the Florida Constitution, Art. IV Section 30, Br. pp. 43–44, supreme authority to regulate fresh-water fishing is vested in the commission and the legislature may enact laws, other than those fixing penalties and license taxes, only "in aid of, but not inconsistent with" those of the commission. Therefore, when the Florida legislature speaks of "laws" relating to fresh-water fish, it must have reference to the rules promulgated by the commission. *Bronson* v. *Florida,* 83 So. 2d 849, Br., p. 18. There would be no other "laws" to which the statute could refer; if Sections 372.07 and 372.70 do not include the commission's rules and regulations under the term "laws" those general provisions of the Florida statutes would have minimal effect, if any at all.

The Government's contention that the status of the commission rules as valid and binding law within the state of Florida is determinative of their status as "the law of the state" within the meaning of the Black Bass Act is entirely consistent with the holding in *United States* v. *Eaton,* 144 U. S. 677. There, a statute (24 Stat. 209) levied a tax on oleomargarine

and regulated in detail oleomargarine manufacturers. Section 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require, but that Section imposed no penalty for non-compliance with its provisions. Section 18 of the act provided a penalty for the failure to "do, or cause to be done, any of the things required by law * * *." The question presented was whether a dealer in oleomargarine who failed to keep a book and make a monthly return prescribed in a regulation, failed, within the meaning of Section 18 of the act, to do a thing "required by law." The Court held that he did not because the statute imposed no penalty for any neglect to keep the books required by the regulations. In *United States* v. *Grimaud,* 220 U. S. 506, the *Eaton* case was distinguished and not followed where the statute in question contained a provision punishing for a violation of regulations issued pursuant to the statute. See also *In re Kollock,* 165 U. S. 526. And in *Singer* v. *United States,* 323 U. S. 338 this Court wrote, at p. 345:

> *United States* v. *Eaton* turned on its special facts, as *United States* v. *Grimaud,* 220 U. S. 506, 518–519, emphasizes. It has not been construed to state a fixed principle that a regulation can never be a "law" for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute.

The instant case is one where, as in *Grimaud* and *Kollock* and unlike *Eaton,* a violation of the rules and regulations of the commission is a misdemeanor

within the state of Florida. 14 Florida Statutes Annotated, Section 372.83, Br., p. 46, provides that:

> Any person violating any rule, regulation or order of the game and fresh water fish commission adopted pursuant to § 30, article IV, of the constitution of this state and this chapter shall be guilty of a misdemeanor.[4]

Thus, even if the Black Bass Act be construed only to apply to violations of state statutes, a Florida statute would have been violated had the fish been transported in the manner alleged in the information.

2. The Court has inquired as to the extent to which the states enforced conservation programs through administrative bodies in 1926.

We have requested the Solicitor, Branch of Fish and Wildlife, Department of the Interior, to ascertain how

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[4] 14 Florida Statutes Annotated, Section 372.71 provides:

372.71 Fines and penalties; forfeiture of license

Any person violating the provisions of this chapter, shall, upon conviction, unless otherwise provided, be fined for the first offense not less than ten dollars nor more than three hundred dollars, or imprisoned not to exceed ninety days, and for a second or subsequent offense shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months. Any person convicted as aforesaid shall forfeit any license or permit that may have been issued to him under the provisions of this chapter and shall forthwith surrender the same to the court. If such violation occurs in the open season no license or permit shall be issued under the provisions of this chapter to such person at any time during the remainder of such open season, or if such violation occurs during the closed season no license shall be issued to such person for the open season next following.

many states had fish commissions with regulatory authority when the Black Bass Act was first enacted in 1926. As soon as this information (which is not now available in collected form) has been compiled, we will forward it to the Court. We respectfully suggest again, however, that the dates of the subsequent amendments of the Black Bass Act in 1947 and 1952 and the conditions which existed at the time of such amendments are also pertinent. The 1947 amendment of the Black Bass Act extended its provisions to apply to all game fish and not merely to the one species. At that time, Congress reexamined the purpose and effects of the Black Bass Act and the reports accompanying the bill state that "* * * the Federal Government must collaborate in the enforcement of protective laws and regulations at the point where State jurisdiction ends," S. Rep. No. 288, 80th Cong., 1st Sess.; H. Rep. 986, 80th Cong., 1st Sess., Br., pp. 29-30. In view of the nature of the 1947 amendment and the legislative history which surrounds it, the conditions which were prevalent in the states as of 1947 are relevant in ascertaining the intent of Congress. As indicated at pp. 31–32 of the Government's brief, surveys conducted in 1948 and 1953[5] indicate

[5] The Black Bass Act was amended in 1952 to extend its coverage to all fish, not merely game fish. Br., p. 30.

Nine copies of the survey made in 1948 by the Wildlife Management Institute and of the 1953 survey of the Sport Fishing Institute, summarized at p. 60 of the Sport Fishing Institute Bulletin, January, 1954, are submitted herewith.

that the overwhelming majority of states administer conservation programs through commissions.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
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DECEMBER, 1956.

APPENDIX

FLORIDA GAME AND FRESH WATER
FISH COMMISSION,
Tallahassee, December 6, 1956.

Re *United States* v. *Ludenia Howard*,
D. J. File No. 138–18–1.

Honorable J. LEE RANKIN,
Solicitor General,
Washington, D. C.

DEAR MR. RANKIN: We have in a telephone conversation this date discussed several matters pertaining to fishing and hunting regulations changes and procedures with Mr. Leonard B. Sand of your office.

For your information, the Rules and Regulations of the Florida Game and Fresh Water Fish Commission are printed in the Code Book, copies of which have been forwarded to Mr. Sand. This Code Book is revised as often [as] revisions warrant, normally from twice a year to an annual revision.

Several thousand copies of the Code Book are printed. They are placed in the hands of the Secretary of State, the County Judges, the County Prosecuting Attorneys, principal sporting goods and license dealers, and anyone else requesting a copy.

When minor changes are made in the Regulations at Commission meetings, two weeks prior notice of such meetings is published in papers having general circulation in Florida. Then such minor changes are certified to the Secretary of State, the County Judges and advertised in the papers. It is also the practice of the Game and Fresh Water Fish Commission when regulations of a general state-wide nature

are anticipated to conduct public hearings throughout the State, giving all interested citizens an opportunity to participate in a discussion of the Rules and Regulations with the Commission. These meetings are held annually and we might add that before the last regulations were approved, twelve such public hearings were held in various points throughout the State. This has been the practice for some time and the newspapers and radio stations of the State are most generous in appraising the people of all Rules and Regulations of the Commission.

We are pleased to pass this information on to your office. If we can be of any further service, please advise.

Very truly yours,

/s/ A. D. Aldrich,

A. D. ALDRICH, *Director.*